



February 26, 2016

By Web Submission to FOIAonline

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
hq.foia@epa.gov

RE: Freedom of Information Act request regarding lists of certain sources of hazardous air pollutants regulated under the Clean Air Act

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), we request on behalf of the Sierra Club copies of all records¹ that identify, relate to, or discuss one or more sources (as defined in the Clean Air Act, 42 U.S.C. § 7412(a)(1)) in the 42 U.S.C. § 7412 source categories enumerated in Table A (below) including, but not limited to, the following:

- Lists or inventories of sources in the Table A source categories;
- Lists or inventories of sources to which EPA has sent an information collection request related to the Table A source categories; and
- Any memoranda created by EPA staff or an EPA consultant or contractor which lists, inventories, identifies, or describes the sources in the Table A source categories.

We are particularly interested in the most recent and comprehensive list of all such sources in the Table A source categories. It may be possible for us to further limit this request if we have a better idea of the nature and scope of the records in your files. Please call me to discuss this possibility.

You may exclude from the above request any records created or received on or before February 27, 2002.

¹ As used throughout this letter, the terms “record” and “records” mean anything denoted by the use of those words in the text of FOIA and includes all materials in whatever form (handwritten, typed, electronic, or otherwise produced, recorded, reproduced or stored) in EPA’s possession, including, but not limited to, any correspondence, minutes of meetings, memoranda, notes, e-mails, notices, electronic files, tapes, photos, videos, and telefaxes.

Table A: Source Categories Covered By This Request	
Source Category	40 C.F.R. Part 63 Subpart ____
1. Leather Finishing Operations	TTTT
2. Wet-Formed Fiberglass Mat Production	HHHH
3. Primary Copper Smelting	QQQ
4. Rubber Tire Manufacturing	XXXX
5. Generic MACT II – Spandex Production	YY, UU
6. Generic MACT II - Carbon Black Production	YY, UU
7. Generic MACT II - Cyanide Chemicals Manufacturing	YY, UU
8. Surface Coating of Large Appliances	NNNN
9. Friction Materials Manufacturing Facilities	QQQQQ
10. Coke Ovens: Pushing, Quenching, and Battery Stacks	CCCCC
11. Flexible Polyurethane Fabrication Operations	MMMMM
12. Refractory Products Manufacturing	SSSSS
13. Semiconductor Manufacturing	BBBBB
14. Surface Coating of Metal Furniture	RRRR
15. Surface Coating of Wood Building Products	QQQQ
16. Printing, Coating, and Dyeing of Fabrics and Other Textiles	OOOO
17. Primary Magnesium Refining	TTTTT
18. Taconite Iron Ore Processing	RRRRR
19. Miscellaneous Coating Manufacturing	HHHHH
20. Mercury Emissions from Mercury Cell Chlor-Alkali Plants	IIII
21. Lime Manufacturing Plants	AAAAA
22. Iron and Steel Foundries	EEEE
23. Plywood and Composite Wood Products	DDDD

To the extent that records responsive to this request are available in a widely-used electronic format (*e.g.*, pdf, Excel, Word, or WordPerfect files), we would prefer to receive them in that format, provided that the electronic versions are in comprehensible form.

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless, as such disclosure would serve the public interest of educating citizens and advancing the purposes of the Clean Air Act. Such disclosure would also be warranted under the President's 2009 memorandum on FOIA, which announces: "All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA." Pres. Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 Fed. Reg. 4683, 4683 (Jan. 26, 2009).

In the event that you regard any requested records to be exempt and determine not to disclose them (or portions of them), we request that you provide an itemized index which describes each withheld record (or portion) and provides the date of the record, the form of the record, the location of the record, the disclosure exemption that you believe applies and your rationale, and whether any reasonably segregable information has been disclosed.

We also request that responsive records be released as soon as they are available, but in no event later than 20 days as required by law. To the extent that some subset of the requested records is readily available and can be provided immediately, please send it immediately while EPA searches for other records.

REQUEST FOR FEE WAIVER

This FOIA request is submitted on behalf of Sierra Club. Sierra Club is the nation's oldest grassroots organization. It has more than 635,000 members nationwide, residing in all 50 states and the District of Columbia. Sierra Club is dedicated to the protection and preservation of the natural and human environment. The Sierra Club's purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

Since the passage of the Clean Air Act, Sierra Club has worked to strengthen and fully implement its mission by providing essential services to its membership including education and dissemination of information, public representation, and litigation for full and effective implementation of the Clean Air Act's protections. Among other things, Sierra Club has dedicated itself to reducing air pollution and protecting public health and its members from industrial sources of air pollution, including hazardous air pollutants. It is part of Sierra Club's mission to protect its members' health and their ability to enjoy the outdoors without experiencing exposure to air pollution from industrial sources and other resulting harm. Sierra Club works to fulfill its mission by regularly providing information and services to members and the public.

Sierra Club requests that you waive all fees in connection with this matter. As shown below, Sierra Club meets the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the EPA's fee waiver regulations at 40 C.F.R. § 2.107. In particular, Sierra Club has demonstrated that the disclosure of this information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.

In considering whether a requester meets the fee-waiver criteria, it is imperative that the EPA remember that FOIA carries a presumption of disclosure and was designed specifically to allow non-profit, public interest groups such as Sierra Club access to government records without the payment of fees. As stated by one Senator, "[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information" 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). The Ninth Circuit has stated that FOIA, as amended in 1986, "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has likewise explicitly pointed out that the 1986 amendment's main purpose was "to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA." *Id.*

Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by "watchdog" organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As the U.S. Court of Appeals for the District of Columbia Circuit has stated, this waiver provision was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests," in clear reference to requests from journalists, scholars, and, most importantly for present purposes, non-profit public interest groups. *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984).

I. The subject of the requested records concerns "the operations or activities of the government."

The subject matter of this request relates to the implementation of environmental laws and regulations, and in particular to EPA's assessments and determinations regarding significant sources of hazardous air pollution that it must regulate under the Clean Air Act. It is clear that such actions, as well as EPA's overall implementation and execution of environmental laws, are specific and identifiable activities of an executive branch agency of the government. See *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) ("[R]easonable specificity" is "all that FOIA requires" with regard to this factor.). Thus this FOIA request plainly concerns the operations or activities of the government.

II. The disclosure is "likely to contribute" to an understanding of government operations or activities (the informative value of the information to be disclosed).

The records requested will contribute to an understanding of federal government operations. The request likely will result in disclosure of records not already in the public

domain. The requested records are “meaningfully informative” of EPA’s ongoing oversight of sources of hazardous air pollutants pursuant to its continuing obligations under the Clean Air Act to protect people’s health and the environment from the impacts of toxic air pollution. In particular, the requested records will convey information about which facilities EPA has identified as exceeding (or potentially exceeding) the tons per year of hazardous air pollutants threshold and, therefore, as being subject to the emission standards and requirements EPA has promulgated and that EPA must continue to strengthen as necessary pursuant to 42 U.S.C. § 7412(d)(6) and § 7412(f)(2). Such information will allow better understanding of government operations, and in particular, which facilities EPA has (and has not) identified as belonging to the Table A source categories and, therefore, will be (or will not be) considered in any future regulatory decisions EPA will make pursuant to the regulatory review provisions, 42 U.S.C. § 7412(d)(6), § 7412(f)(2), or other Clean Air Act requirements. Many citizens are concerned about the threats hazardous air pollution poses to their health and to the environment. Thus, production of the requested records is “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552 (a)(4)(A)(iii); 40 C.F.R. § 2.107(k)(2).

In *McClellan Ecological Seepage Situation*, 835 F.2d at 1286, the court made clear that “[FOIA] legislative history suggests that information has more . . . potential [to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations.” In this instance, the requested records will likely provide new information about EPA’s identification of and regulation of significant polluters under the Clean Air Act. To Sierra Club’s knowledge, EPA has not made public a list or inventory of the facilities subject to the emission standards and requirements for facilities in the Table A source categories since EPA’s adoption of regulations for those categories, or even longer. See *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1040 n.2 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); see also *Cnty. Legal Servs. v. HUD*, 405 F. Supp. 2d 553, 560 (E.D. Pa. 2005) (“Thus, as in *Forest Guardians*, the CLS request would likely shed light on information that is new to the interested public.”) (citing *Forest Guardians v. DOI*, 416 F.3d 1173, 1180 (10th Cir. 2005)).

III. The disclosure of the requested information will contribute to “public understanding.”

The information requested will contribute to public understanding of how EPA is discharging its functions under the Clean Air Act to protect air quality and public welfare and the environment nationally. The information requested will also help provide Sierra Club, Sierra Club members, and the public that Sierra Club disseminates information to with insight into EPA’s implementation of the Clean Air Act with respect to hazardous air emissions from industrial sources. The request will likely result in disclosure of records not currently in the public domain. Their release is not only “likely to contribute,” but is in fact certain to contribute significantly to better public understanding of the operations or activities of the government concerning its regulation of sources of hazardous air pollutants. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(k)(2).

In *McClellan Ecological Seepage Situation*, 835 F.2d at 1286, the court made clear that “[FOIA] legislative history suggests that information has more . . . potential [to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations.” In this instance, the requested records will likely provide new and updated information about the specific plants that EPA has determined to be or believes to be subject to hazardous air pollutant limits. Knowledge of the universe of regulated facilities subject to statutory emission limits is essential to the public’s understanding of the quantity of emissions from the industry and the public’s ability to oversee and evaluate EPA’s enforcement of those limits, as well as to assess the completeness and accuracy of EPA’s inventory of sources. Accordingly, the records sought by this request will provide important oversight of EPA operations. Moreover, the records we seek are likely to provide new information not already in the public domain. See *W. Watersheds Project*, 318 F. Supp. 2d at 1040 n.2; see also *Cnty. Legal Servs.*, 405 F. Supp. 2d at 560.

Public understanding of the new information will be achieved because Sierra Club intends to use the new information that it receives to educate the public by informing the public about the significant sources of hazardous air pollutants in their communities and EPA’s implementation of the statutory requirements to regulate the hazardous air pollutants from those sources. In connection with future scheduled and planned regulatory actions, Sierra Club would also inform the public about EPA’s need to fully and properly identify and regulate all sources of hazardous air pollutants. In addition, an understanding of the facilities in the Table A source categories would enable an evaluation of EPA’s enforcement of Clean Air Act emission limits and requirements, which could lead to information and insights that Sierra Club would disseminate to the public.

In determining whether the disclosure of requested information will contribute to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. *Carney v DOJ*, 19 F.3d 807 (2nd Cir. 1994). The requester need not show how it intends to distribute the information, because “[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity.” *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the requester to show how it distributes information to the public generally. *Id.*

Sierra Club routinely uses FOIA to obtain information from federal agencies that Sierra Club’s legal department and scientific experts analyze in order to inform the public about a variety of issues. Sierra Club has a long-standing interest and expertise in the protection of public health from hazardous air pollution, and has long worked to educate its members and the public on the health and environmental impacts of hazardous air pollution. Sierra Club has a proven ability to digest and disseminate information about air pollution effectively.

Sierra Club maintains an extensive infrastructure for disseminating information to the public. Sierra Club disseminates the information it receives under FOIA regarding government operations and activities through a variety of ways, including but not limited to analysis and distribution to the media, distribution through publication and mailing, posting on the Club’s website (which is updated daily and is publicly accessible), and emailing and listserve distribution to Club members. Sierra Club maintains a webpage dedicated to the topic of clean

air and regularly updates its content. In addition, Sierra Club publishes articles in *SIERRA* magazine, which has a print version only available to dues-paying members, and a free version which is available online to the public. Sierra Club also uses a variety of social media, including Facebook, Twitter, and regularly updated blogs, to communicate with its members and supporters about air issues. Sierra Club also disseminates information it gathers to Sierra Club chapters and local Sierra Club groups which, in turn, communicate with local members through meetings and events, their websites and blogs, and periodic newsletters. Club members can also receive online action alerts that provide breaking news on environmental and health issues and an opportunity for members to communicate to leaders and policy makers, for instance, by providing comments on EPA rulemakings.

Information concerning the plants that are sources of hazardous air pollutants and concerning EPA's compliance with and implementation of Clean Air Act requirements for those plants will likely be disseminated through all or many of these means. The records sought in this FOIA request will be used to determine whether and how the EPA is complying with and implementing its obligations in regard to the Clean Air Act and, more specifically, to assess EPA's identification of the sources in the country that are subject to the hazardous air pollutant emission limits the agency has established. Concurrent with any action which the Sierra Club may take after obtaining the requested records, Sierra Club will publicize the reasons for the action and the underlying actions of EPA and/or other agencies that have prompted the action. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of EPA responsibilities. The courts have recognized that similar information distribution activities are likely to contribute to public understanding of government operations and activities. *See Forest Guardians*, 416 F.3d at 1180 ("Among other things, Forest Guardians 'publishes an online newsletter, which is e-mailed to more than 2,500 people' and stated that it 'intend[s] to establish an interactive grazing web site' with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.").

IV. The disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

Public oversight and enhanced understanding of EPA's performance of its statutory duties is absolutely necessary. Sierra Club's track record of active participation in oversight of governmental agency activities and its consistent contribution to the public's understanding of agency activities as compared to the level of public understanding prior to disclosure is well established.

The requested information is certain to shed light on EPA's implementation of Clean Air Act requirements to regulate hazardous air pollutants from sources, and will help show whether or not the EPA is acting properly. The records sought are likely to provide information not already in the public domain. The records in question will, among other things, help reveal EPA's actions regarding its continuing responsibilities to implement and carry out Clean Air Act requirements to control hazardous air pollutants. The public's understanding of these matters, as

compared to the level of public understanding existing prior to the disclosure, will be significantly enhanced by the dissemination of this information. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Sierra Club intends to fulfill its well established function of public oversight of agency action.

As described above, Sierra Club is able to disseminate information such as that presently requested through FOIA to a broad audience of persons interested in the subject, including the media, its members, and the general public. *See Carney*, 19 F.3d 807.

V. Obtaining the information is of no commercial interest to Sierra Club.

Access to government records and similar materials through FOIA requests is essential to Sierra Club's role of educating the general public. Sierra Club is a not-for-profit organization and, as such, has no commercial interest and will realize no commercial benefit from the release of the requested information.

If you determine not to waive all fees, please consult us before processing this request and notify us if the cost of responding to this request will be more than \$100.00. Any payment will not constitute waiver of Sierra Club's right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

CONCLUSION

Please send responsive records to Earthjustice, Attn: Nicholas Morales, 1625 Massachusetts Ave. NW, Ste. 702, Washington, DC 20036 or by email to nmorales@earthjustice.org.

If you find that this request is unclear in any way, or that the number of records responsive to this request is relatively large or difficult to copy, please do not hesitate to call Nicholas Morales at 202-797-5250 or Emma Cheuse at 202-745-5220.

Thank you for your assistance.

Sincerely,

/s/ Nicholas Morales

Nicholas Morales
Emma C. Cheuse
Counsel for Sierra Club